VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
	)	
	)	DOCKET NO. 82-25
v.	)	and
	)	DOCKET NO. 82-13
STATE OF VERMONT (re: Implementation of 6-2 Schedule at Vermont State Hospital)	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 29, 1982, the Vermont State Employees' Association ("VSEA") filed an unfair labor practice charge with the Vermont Labor Relations Board against the State of Vermont ("State"). VSEA alleged the unilateral implementation by the State of a six-days on/two-days off work schedule ("6-2 Schedule") for certain employees of the Vermont State Hospital constituted a violation of 3 VSA §961(1) and (5), and the attempt by the State to bargain individually with the employees was a violation of 3 VSA §961(1), (3), and (5).

The Board, taking the allegations contained in the charge as true, issued an unfair labor practice complaint on May 18, 1982. A hearing was held before the full Board on June 3, 1982. Assistant Attorney General Scott Cameron represented the State. VSEA was represented by its Attorney, Michael R. Zimmerman. At the hearing, the parties submitted a stipulation which provides for agreement on certain facts and the withdrawal by VSEA of its charge that the State attempted to bargain individually with employees. At the close of the hearing, the Board provided VSEA an opportunity to amend its charge by June 7, 1982, if it so desired.

On June 7, 1982, VSEA notified the Board it was not amending its charge. On June 10, 1982, the Board amended its unfair labor practice complaint pursuant to 3 VSA §965(c), to further allege the State may have committed an unfair labor practice in violation of 3 VSA §982(g) through implementing its plan for a 6-2 schedule prior to fulfilling the requirements of Article 18, Section 2, of the collective bargaining Agreement to "negotiate to the extent required by law" before implementation.

A hearing was held June 17, 1982, to determine what the parties negotiating the Agreement meant by the phrase "negotiate to the extent required by law". Attorney Zimmerman represented VSEA. Assistant Attorney General Cameron represented the State.

Requested Findings of Fact and Memoranda were filed by VSEA and the State on July 7, 1982, and July 22, 1982, respectively.

On July 30, 1982, the Board withdrew its May 27, 1982, Memorandum and Order in #82-13, the companion case to this one, concerning VSEA's petition to appoint a fact-finder to resolve the dispute regarding the "6-2" schedule. The decision was withdrawn to be decided together with #82-25 since the Board has heard evidence and had the benefit of briefs and arguments in #82-25 which were not available to it in #82-13 and since in the event of an appeal it is desirable the Supreme Court have a complete record available to it for review.

FINDINGS OF FACT

1. VSEA is the exclusive bargaining agent for Vermont State Employees.

2. The employees concerning whom this unfair labor practice charge was filed are all employed by the State, Department of Mental Health, and all work at the Vermont State Hospital, in Waterbury, Vermont.

The employees (about 215 in all) are employed in the position classes of Ward Aide (Pay Scale 3), Psychiatric Aide Trainee (Pay Scale 4), Psychiatric Aide (Pay Scale 5), Psychiatric Technician A (Pay Scale 7), and Psychiatric Technician B (Pay Scale 9). In all, those employees represent about 41 percent of the total employee population at the Vermont State Hospital.

3. Employees' work schedules are varied: Some employees have every weekend off; some have every third weekend off; some have no weekends off; only one employee has every weekend off.

4. In late November, 1981, a representative of the State requested a meeting with VSEA representatives concerning a proposed schedule change for employees. That proposed schedule would involve placing employees on a six-days-on/two-days-off work schedule, which would mean employees would have two three-day weekends off every seven weeks.

5. Bargaining sessions between representatives of the State and VSEA were held December 7, 1981, January 5, 1982, February 5, 1982, February 16, 1982, February 18, 1982, February 23, 1982, and February 25, 1982. At the February 25, 1982, bargaining session, VSEA declared impasse.

6. On February 26, 1982, VSEA petitioned the Board for the appointment of a mediator. On March 11, 1982, the Board asked the Federal Mediation and Conciliation Service to appoint a mediator, and they acceded to the Board's request by appointing Ira Lobel.

7. On April 2, 1982, a mediation session was held. The last offer made by the State in the mediation session contained the following relevant elements:

A. The 6-2 schedule would be implemented on May 1, 1982, for those employees who volunteered, and on July 1, 1982, for those employees who did not volunteer.

B. Employees who volunteered for the 6-2 schedule would receive one-time bonuses in the following amounts:

(1) Employees whose previous schedules allowed them every weekend off or every other weekend off would receive a $250 bonus;

(2) Employees whose previous schedules allowed them every third weekend off would receive a $100 bonus;

(3) Employees whose previous schedules did not allow them any weekends off would receive a $100 bonus.

C. Employees upon whom the 6-2 schedule would impose a hardship could be exempted from said schedule by a hardship panel composed of, among other members, a VSEA representative.

8. On April 9, 1982, VSEA notified the State that their offer of April 2, 1982, was rejected.

9. On April 14, 1982, VSEA requested that the Board appoint a fact-finding panel, and, on April 21, 1982, the State filed with the Board an opposition to that request.

10. On April 21, 1982, the State implemented the 6-2 schedule at the Vermont State Hospital. On that date, the Superintendent of the Vermont State Hospital issued a memorandum to all ward staff announcing the method of implementation as follows:

A. Volunteers would begin the 6-2 schedule on May 9, 1982, and would receive bonuses. Those who did not volunteer would begin the schedule at the start of the July 4, 1982, payroll period, and would not receive bonuses.

B. Volunteers would receive bonuses in the following amounts:

(1) $250 for those employees whose previous schedules (i.e., previous to the 6-2 schedule) allowed them either every weekend off, or every other weekend off;

(2) $100 for those employees whose previous schedules allowed them no weekends off, or every third weekend off.

C. Hardship reviews for the purpose of exemption from the 6-2 schedule would be made by the Superintendent rather than by a panel.

11. On April 26, 1982, Mediator Ira Lobel notified the Board he had been unable to mediate a settlement, and believed that further mediation would be fruitless.

12. In response to the April 21, 1982, Memorandum, eight employees volunteered for the 6-2 schedule, received bonuses, and began working the 6-2 shift on May 9, 1982.

13. On May 27, 1982, the Board granted VSEA's request for the appointment of a fact-finding panel. Petition of VSEA for Appointment of Fact-Finding Panel, 5 VLRB 215 (1982).

14. Employees who did not volunteer for the 6-2 schedule were not involuntarily assigned to that schedule on July 1, 1982, due to the State's agreement to delay that phase of implementation until this Board rules on the unfair labor practice herein.

15. This dispute arose while a collective bargaining agreement between VSEA and the State was in effect (i.e., the one effective for the period July 1, 1981, to June 30, 1982). Article 18 of that contract provided, in pertinent part, as follows:

> 2. New Shifts - In any department or institution, prior to establishment of a new workweek...the appointing authority shall notify the Association and shall negotiate the impact of that decision to the extent required by law.
>
> (VSEA Exhibit 3)

16. The contract immediately preceding the one in effect from 1981 to 1982 was in effect from July 1, 1979, to June 30, 1981. Article XVII of that contract contained language identical to that of Article 18 of the 1981-82 contract quoted above (VSEA Exhibit 2). The language which appeared in Article XVII of the 1979-81 contract had never before appeared in a contract between VSEA and the State.

17. During negotiations for the 1979-81 contract, Robert Babcock, Jr., was the Chief Negotiator for VSEA in his capacity as Executive Director. The Chief Negotiator for the State was Allan Drachman.

18. Negotiations for the 1979-81 contract began on June 14, 1978. The contract in effect at that time (July 5, 1976 to June 30, 1979 contract) was silent concerning the duty to bargain or negotiate prior to implementing new work schedules (VSEA Exhibit 1). During that contract year, a dispute had arisen concerning schedule changes for nursing service employees at the Vermont State Hospital. In that case, the State had taken the position that there was no duty to bargain schedule changes for nursing service employees during the life of the contract. The Union's position on this matter was that a change in work schedules was a mandatory subject of bargaining pursuant to 3 VSA §903. Accordingly, VSEA filed an unfair labor practice charge regarding the State's refusal to bargain the change in work schedule for the nurses at the Vermont State Hospital.

19. Because of the pendency of that matter, and in order to make clear in the 1979-81 contract the State's duty to bargain such schedule changes, VSEA presented a proposal to the State at the beginning of negotiations, which proposal contained the following relevant language:

> Changes in the work schedules for State employees in agencies, departments, divisions or institutional shifts, or major portions thereof, shall be subject to collective bargaining.
>
> (VSEA Exhibit 4)

20. Negotiations on the 1979-81 contract continued until about September 29, 1978. At that time, a mediator, Parker Denaco, was called in to resolve the remaining unresolved issues, among them the question of whether the State had a duty to bargain schedule changes. At the time, the Board had not yet decided the issue in the unfair labor practice case; whether the schedule changes were mandatory subjects of bargaining. Prior to mediation, there had not been much substantive discussion on the question.

21. During mediation on September 29, 1978, the State suggested the language which became Article XVII of the 1979-81 contract. The discussion between the parties over this language concerned the scope of bargaining. The State contended they had no duty to bargain schedule changes at all; VSEA maintained it was a mandatory subject of bargaining. The resultant language left the matter to litigation; the Board or the Supreme Court decision in the pending case would determine to what extent schedule changes had to be negotiated, if at all. The parties, when they agreed to the language, were not thinking in terms of whether statutory impasse resolution procedures applied to mid-term bargaining or at what point the State could implement the schedule change; but in terms of whether the matter was negotiable at all.

22. On November 22, 1978, VSEA filed another unfair labor practice charge involving the refusal of the State to bargain over schedule changes for nurses at the Vermont State Hospital. That matter was decided by the Board in a decision dated February 2, 1979, wherein it held that the State

had a duty to bargain schedule changes during the term of the contract. VSEA v. State of Vermont, 2 VLRB 26 (1979). On June 29, 1979, the Board decided the unfair labor practice charge which had been pending during negotiations for the 1979-81 contract, and held, again, that the State had a duty to bargain schedule changes during the contract term. VSEA v. State of Vermont, 2 VLRB 155 (1979). The State appealed from both rulings, and those appeals were pending when negotiations for the 1981-82 contract began.

23. On June 11, 1980, the Vermont Supreme Court handed down its decision in the case of Vermont State Colleges Faculty Federation v. Vermont State Colleges, (138 Vt. 451), wherein it held that there is no mandatory-permissive dichotomy regarding subjects of bargaining under the State Employees' Labor Relations Act, and that only those matters relating to the relationship between employer and employees controlled by statute are not subject to bargaining under the Act. Drachman, the State's negotiator, was aware of that decision during bargaining for the 1981-82 contract, and was of the opinion that decision meant the Court would uphold the Board's decisions in the two unfair labor practice cases which had been appealed by the State. During negotiations for the 1981-82 contract, VSEA representatives were unaware of the Supreme Court decision.

24. Bargaining for the 1981-82 contract began on June 11, 1980, and lasted through the end of January, 1981. Mediation and fact-finding were used. During these negotiations, Drachman represented the State. VSEA's Chief Negotiators were Judy Rosenstreich, Executive Director, from June to December of 1980, and James Konkle thereafter.

25. During bargaining for the 1981-82 contract, no proposals were made to change the language relevant to schedule changes (See Finding #15 above), and the language was contained in the 1981-82 contract. Also, there was no discussion concerning whether statutory impasse resolution procedures applied to such situations. Due to its knowledge of the Supreme Court's decision in Vermont State Colleges Faculty Federation, supra, the State now believed work schedule changes were bargainable. However, they believed that to "negotiate...to the extent required by law" meant a few good faith discussions on the issue, and they could implement thereafter. VSEA, unaware of the Court decision, still considered that meaning of the phrase "negotiate to the extent required by law" would be determined by the Court, and if schedule changes were determined negotiable, inclined to view this as negotiating through the completion of statutory dispute resolution procedures. Due to their differing views of the precise meaning of the phrase "negotiate to the extent required by law", the parties tacitly allowed the meaning of the phrase to be determined by litigation.

26. The Supreme Court issued its orders in the two unfair labor practice cases concerning work schedule changes on September 17, 1980. Both orders provided as follows:

> The contract involved in this litigation having, by its terms, expired, without infringement of the rights sought to be enforced thereunder, the appeal is dismissed as moot.

27. No emergency, fiscal or otherwise, existed at the time of the hearing on this matter or existed at any previous time requiring the State to implement the 6-2 schedule.

28. The Secretary of Administration has not issued "temporary rules and regulations" pursuant to 3 VSA §982(f) implementing the schedule changes at the Vermont State Hospital.

OPINION

There are two issues before us. First, does the implementation by the State of a schedule change during the term of the collective bargaining agreement for employees of the Vermont State Hospital, prior to exhaustion of statutory impasse procedures, or declaration of "necessity" by the Secretary of Administration under 3 VSA §982(f), constitute an unfair labor practice in violation of 3 VSA §961(1) and/or (5), and/or 3 VSA §982(g)? Second, are we required to appoint a fact-finding panel to assist VSEA and the State in resolving an impasse in negotiations concerning the impact of the proposed schedule changes? We answer both questions in the affirmative.

1. The Duty to Bargain

We discuss both questions together. The crux of them are whether the rules governing the parties' bargaining duty in this case are any different than they would be if the dispute arose during negotiations for a new agreement after expiration of a master agreement. To analyse that issue we find it helpful to review the parties' duties in that context, a situation the Legislature clearly provided for, and then turn to the specific facts of this case to determine whether a different result is required.

Unless "work schedules" are non-bargainable subjects, Management could not unilaterally impose new work schedules on the Hospital employees at expiration of a master agreement, except through action of the Secretary of Administration under 3 VSA §982(f). VSEA v. State of Vermont, 134

Vt. 195 (1976). This settlement would only be temporary. 3 VSA §982(f). That procedure has not been utilized by the State, so we must determine if "work schedules" are a mandatory subject of bargaining.

We continue to believe work schedules constitute working conditions which are mandatory bargaining subjects under 3 VSA §904(a)(3). VSEA v. State of Vermont, 2 VLRB 26 (1979). VSEA v. State of Vermont, 2 VLRB 155 (1979)("the Nurses' cases"). Those views are strengthened by the Supreme Court decision in Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451 (1980), which adopted a broad view of what are mandatory bargaining subjects. The Court held that, under the State Employees Labor Relations Act (SELRA), an issue is bargainable if it is a matter "relating to the relationship between the employer and employees", and it is not "prescribed or controlled by statute". Work schedules are a key part of the "relationship between the employer and the employees" and are "working conditions", VSEA v. State of Vermont, 2 VLRB 26 (1979), 3 VSA §904(a)(3). That the Legislature intended work schedules to be considered mandatory bargaining subjects under SELRA is made clearer by 3 VSA §925(f)(2), which provides that a fact-finding panel appointed in negotiations disputes shall consider in making a recommendation, "work schedules relating to assigned hours and days of the week..." Clearly, if the fact finders are to consider this issue, it must be bargainable. The fact that 3 VSA §925(f)(2) contains this provision, and the Supreme Court decision in Colleges Faculty Federation, supra, confirm our view that the legislative purpose we devined in "the Nurses' cases", supra, is correct.

Hence, it follows that the State would have a duty to bargain over the subjects here in dispute if there was an expired agreement, and the remaining issue would be to what extent must bargaining go on. For reasons which follow, we believe that duty encompasses all of the procedures provided for in 3 VSA §925 whether or not the Secretary of Administration acts under 3 VSA §982(f).

Whenever the parties reach an "impasse" during bargaining on mandatory subjects, they may request assistance from this Board, as has VSEA by its petition to appoint a fact-finding panel. SELRA's impasse resolution procedures are found in 3 VSA §925(a) which provides:

> Whenever the representative of a collective bargaining unit and the representative of the employer, after a reasonable period of negotiation reach an impasse during the course of collective bargaining on subjects defined in Section 904 of this title, the board, upon petition of either or both parties, may authorize the parties to submit their differences to mediation.

If mediation fails, the Board shall appoint a fact-finding panel. 3 VSA §925(b). If fact-finding does not resolve the impasse, the Board selects between the last best offers of the parties, and recommends its choice to the general assembly as the bargaining agreement which shall become effective subject to appropriations by the general assembly. Nothing precludes the general assembly from enacting laws amending provisions of any agreement arrived at under this section. §925(i). With the sole exception of the appointment of a mediator, all the other steps are mandatory. The Legislature clearly used the word "shall" in each case.

However, even in view of the mandatory language of 3 VSA §925, the State disputes the proposition that statutory impasse resolution procedures are mandatory. Drawing on private sector principles, it asserts the right to impose a settlement at "impasse"; the point reached "after the parties have bargained in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless." Durd Fittings Co., 121 NLRB 377, 383 (1958). NLRB v. Tex-Tan, Inc., 318 F2d 472, 482 (5th Cir. 1963).

In the private sector, an employer generally can make unilateral changes after an impasse has been reached in negotiations. This impasse requirement serves two purposes: it ensures the parties will engage in meaningful bargaining and allows an employer at some point to bring about the changes it seeks. If a union chooses not to agree to such changes, it has an available alternative; it can strike. NLRB v. Erie Resister Corp., 373 US 221 (1963). American Shipbuilding Co. v. NLRB, 383 US 300 (1965).

The strike threat offers a powerful inducement to meaningful collective bargaining in the private sector. As Arvid Anderson, Chairman of the New York City Office of Collective Bargaining, writes:

> As a philosopher once declared, there is nothing as likely to focus a man's attention as the certainty that he is to be hanged in the morning. The decision by employees to strike or by employers to take a strike by a certain deadline is not as critical a prospect as the hangman's noose. Nevertheless, the strike weapon (the notion of trial by economic combat) is a powerful inducement to decision-making and a great stimulus to private sector collective bargaining... ("Arbitration and the Law: A Better Way", Labor Law Journal, May 19, 1979, pg. 259-67)

However, in the public sector, the economic weapon of strike has generally been taken away from employees by state legislatures in order

that the continuation of the delivery of essential government services be ensured. In the absence of the strike threat, the balance of power is shifted heavily in favor of the employer. The union is left without an effective response to unilateral action by an employer once impasse is reached; and accordingly, the inducement to meaningful bargaining the strike threat provided no longer exists.

In recognition of the need to induce meaningful bargaining and balance the bargaining powers of the parties, many jurisdictions have provided for the use of dispute resolution machinery to assist public sector parties in resolving their negotiations disputes. These mechanisms generally provide for mediation, and/or factfinding, and/or arbitration; dispute resolution devices not commonly employed in the private sector. In the above-cited article, Anderson explains the success of one of these mechanisms, interest arbitration, as an effective dispute resolution alternative to the strike:

> The record shows that interest arbitration is a realistic alternative to the strike as a means of impasse resolution... I base my thesis on the experience of some 21 public sector jurisdictions... The process of interest arbitration in these jurisdictions...has demonstrated, in the words of Walter Reuther, 'that the power of persuasion can be as effective as the persuasion of power' and 'that reason can be substituted for muscle' in dispute settlement. The prospect of an arbitrator ultimately imposing the terms of a contract on the parties if they do not voluntarily reach an agreement has proved to be an effective inducement to settlement. Parties prefer to make their own agreements under arbitration procedures, just as they do where the strike is lawful.

The introduction of dispute resolution procedures in the public sector raises the question of when the employer may make unilateral changes. May the unilateral changes be made prior to using the dispute

resolution procedures or after their exhaustion? Should public employers have the same latitude to make unilateral changes which is accorded to private sector employers?

This is a question in public sector labor law where there is no unanimity among statutes, state labor relations boards, and courts.[1] Despite the lack of unanimity among the states on this issue, there is a consensus in all the cases that government must function normally while negotiations go on.

The States have adopted different analytical frameworks to deal with the problem. No state statutes we have examined (except our own) deal with the issue explicitly. Several jurisdictions have applied the private sector precedent and permit unilateral management action at impasse prior to use of any dispute resolution procedures. Commonwealth of Massachusetts, Commissioner of Administration and Finance, Massachusetts Labor Relations Commission, SUP-2497 (1982). New Bedford School Committee, Massachusetts Labor Relations Commission, 8 MLRC 1472 (1981). Maine State Employees Association v. State of Maine, Maine Labor Relations Board, No. 79-43 (1979). MSEA vs. State of Maine and Bureau of Alcoholic Beverages, Maine Labor Relations Board, No. 78-23 (1978). West Hartford Education Association v. DeCourcy, Connecticut Supreme Court, 162 Conn. 566, 295 A2d 526 (1972). These cases are clear recognitions that

[1]For an overview of the differing approaches to this question, see the following articles: "The Emerging Duty to Bargain in the Public Sector", Harry Edwards, 71 Michigan Law Review 885, 924 (1973). "Duty to Bargain Beyond Impasse in Contract Negotiations", Francis Flynn, National Public Employment Reporter (February, 1980). "Maintenance of Status Quo During Public Sector Contract Negotiations", Amedeo Greco, National Public Employment Reporter (August, 1980). Copies of all state labor relations board decisions cited herein are on file at the Vermont Labor Relations Board. All decisions of the state labor relations boards are cited and reported in the National Public Employment Reporter, which is available at the offices of the Vermont Labor Relations Board.

government must go on and, in the absence of any legislatively established solution, are attempts to use private sector principles in the public area.

Other jurisdictions have distinguished between initial statutory impasse and genuine impasse or "deadlock", maintaining genuine impasse or "deadlock" permitting unilateral management action does not occur until the mandated dispute resolution procedures are completed. Deer Park Union Free School District, New York Public Employment Relations Board, 14 PERB 3028 (1981). South Jefferson Central School District, New York Public Employment Relations Board, 13 PERB 3066 (1980).[2] City of Willimantic, Connecticut State Board of Labor Relations, Decision No. 1455 (1976). In New York, two other conditions besides "deadlock" must be present before a public employer may take unilateral action: 1) there are compelling reasons for the employer to act unilaterally at the time it does so, and 2) the employer is willing to negotiate the matter after making the unilateral change. Deer Park. South Jefferson. Since our statute is closely modeled on the New York Taylor Law, these cases have a persuasive power greater than those of Maine or Massachusetts.

[2]For a history and development of labor relations policy in New York State, see The Report of the Taylor Committee (Governor's Committee on Public Employee Relations, Final Report, State of New York, March 31, 1966), which resulted in the enactment of the Taylor Law, the New York public sector labor relations act which the Vermont public sector labor statutes closely model. A copy of the report is available at the Vermont Labor Relations Board.

Unlike the other jurisdictions cited, our Legislature was far-sighted and specifically addressed the issue of when the State may unilaterally implement changes through its enactment of 3 VSA §982(f). We discuss this provision at length in part 2 of this opinion. However, in order to fully understand the intended meaning of this section a review of other state laws relating to labor is instructive.

Our Legislature has provided for dispute resolution machinery in all three public sector statutes to assist public sector parties in resolving their negotiations disputes and induce meaningful bargaining. A review of the Teachers' Act and the Municipal Act shows a consistent legislative pattern applicable to SELRA also.

The Teachers' Labor Relations Act, 16 VSA §1981 et seq., requires, upon request of either party, the use of mediation and fact-finding to resolve negotiations disputes, and provides that "all decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final". 16 VSA §2006-2008. In cases arising under this Act, we have held that the school board may not take unilateral action on matters in dispute until 30 days after receipt of the fact-finders report. We have drawn a distinction between statutory "impasse" and genuine deadlock. An impasse in the public sector, unlike the private sector, does not mean the parties have reached a deadlock, that they have irreconcilable differences. Declaration of impasse simply means a determination by either or both parties to use statutory

dispute resolution procedures; it represents a realization that third-party assistance is needed to continue productive bargaining. Genuine deadlock is not reached until the parties have exhausted the mandated dispute resolution procedures and it is not appropriate for management to make unilateral changes until then. Rutland Education Association v. Rutland School Board, 2 VLRB 250 (1979). Chester Education Association v. Chester-Andover Board of School Directors, 1 VLRB 426 (1978).

The Municipal Employee Relations Act, 21 VSA §1721 et seq., also requires, upon request of either party, the use of mediation and fact-finding to resolve negotiations disputes if the parties are at impasse. It further allows the parties to voluntarily submit a dispute to binding arbitration, and permits a limited right to strike. 21 VSA §1730-1733. In a case arising under this act, Burlington Fire Fighters v. City of Burlington, 4 VLRB 379 (1981), we adopted the distinction between statutory impasse and genuine deadlock applied under the Teachers' Act, and held the employer could not make unilateral changes in conditions of employment until mandated dispute resolution procedures were exhausted.

The principles are equally applicable under SELRA. 3 VSA §925(a) provides that whenever the parties reach an "impasse" in negotiations, they may petition the Board for appointment of a mediator. This statutory "impasse" is not a genuine impasse or "deadlock" permitting permanent unilateral management action. In the public sector, this point does not occur until mandated dispute resolution procedures are exhausted. Until that point, the dispute resolution mechanisms induce further useful bargaining where the potential or assurance (in the case of interest arbitration) of settlement exists.

Under SELRA, there is no such thing as final negotiations "deadlock" permitting permanent unilateral management action. The dispute resolution procedures, which can be invoked upon declaration of impasse by either party are, successively: mediation, fact-finding, selection of one of the parties' last best offers by the Board and recommendation of its choice to the general assembly, and final resolution by the general assembly. 3 VSA §925. The general assembly effectively acts as an arbitrator whose decision is final and binding on the parties. As earlier indicated, the Legislature expressly required the parties to use these procedures.

These dispute resolution procedures of SELRA distinguish it from the Teachers Labor Relations Act, under which the school board has the final "hammer"; it can take unilateral action on matters in dispute 30 days after receipt of the fact-finders report. Rutland, supra. 16 VSA 2006-2008. The procedures under SELRA make it more comparable to the situation which existed in Burlington, supra, where the parties submitted negotiations disputes to binding arbitration. In such a system, as we held in Burlington, there is never a legal deadlock since the parties are required to continue to use dispute resolution procedures until agreement is reached or a settlement is imposed, and management may never take permanent unilateral action.

Thus, if this case is governed by the same rules relating to an expired agreement, the parties would not have fulfilled their bargaining obligations. They have proceeded through mediation but the subsequent dispute resolution steps have not been utilized. Moreover, the Secretary of Administration has not utilized 3 VSA §982(f). Instead, the State's

bargainers have simply declared their intentions to be finished with the process and impose a settlement. We think that stance would be an unfair labor practice in the expired agreement situation, and, for reasons to follow, in the instant case as well. We think both the literal wording of this statute as well as history, policy and logic, prohibit the State from making a "final" unilateral settlement of an issue.

2. Temporary Implementation of Work Schedules

However, the fact that a final deadlock never occurs under SELRA does not mean the State is prohibited from ever unilaterally implementing a change in a mandatory subject of bargaining. Existing alongside SELRA's dispute resolution procedures is 3 VSA §982(f) which provides:

> In the event the employer and the collective bargaining unit are unable to arrive at an agreement and there is not an existing agreement in effect, the secretary of administration, with the approval of the governor, may make such temporary rules and regulations as may be necessary to ensure the uninterrupted and efficient conduct of state business. Such rules and regulations shall terminate and be of no further force and effect, except for any rights arising thereunder, as soon as an agreement is reached.

This provision indicates a recognition by the Legislature of the need for State government to function efficiently, and it clearly expresses a legislative policy to permit "temporary" unilateral management action at some point in the bargaining process, a fact recognized by the Supreme Court in VSEA v. State of Vermont, 134 Vt. 195 (1976). This provision distinguishes SELRA from the statutes in the other states previously discussed which make no express provision for unilateral management action and leave the issue solely to judicial determination.

The Legislature has not clearly indicated exactly when in the bargaining process §982(f) can be invoked in negotiations disputes. We believe a rational construction of the phrase "unable to arrive at an agreement" in such situations occurs at the point parties are unable to reach an agreement without outside assistance; that is, at the point of declaration of impasse pursuant to 3 VSA §925(a). We think the permissive language of §925(a) stating the Board may authorize the appointment of a mediator is intended to allow this Board to make a factual determination as to whether or not "impasse" actually exists. Once this Board determines "impasse" exists, there are other factors limiting the use of §982(f). It can only be invoked if there is not an existing agreement in effect, and the rules are "necessary to ensure the uninterrupted and efficient conduct of State business." This language on the necessity of rules to ensure the "uninterrupted and efficient" conduct of State business parallels the "compelling need" test adopted by the New York Public Employment Relations Board, but as is obvious, is expressly provided for by law.

We note the statutory language allowing the Secretary of Administration to make temporary rules is in the conjunctive requiring the rules be necessary to ensure "the uninterrupted and efficient" conduct of State business. We need not decide here whether the need to make schedule changes can ever be necessary to ensure the "uninterrupted" conduct of State government, nor do we need to decide here what role, if any, the the Board has to play in reviewing actions taken under §982(f).

In sum, there are two distinct concepts established in SEIRA: 1) a system under which a final deadlock never exists because the parties are required to use dispute resolution procedures which culminate in a final

and binding resolution by the Legislature; and 2) the provision for the unilateral implementation of temporary conditions of employment by management under certain conditions. The provision for unilateral implementation does not, however, end the parties' obligation to use the statutory dispute resolution procedures. That obligation continues until agreement is reached by the parties or an agreement is imposed upon them by the Legislature, at which time the temporary rules of the Secretary of Administration lose effect.

Thus, under an expired contract situation, the parties here would not have fulfilled their bargaining obligation since they have not gone through all the mandated dispute resolution procedures. Also, the State would have committed an unfair labor practice by unilaterally implementing the schedule change without following the requirements of 3 VSA §982(f).

3. Mid-Term Bargaining Cases

Given this view of the law in the expired contract situation, we must now examine whether the specific facts of this case remove the parties' bargaining duties from the general rule. There are three possible reasons why that duty could be altered, and we examine each in turn.

3(a) The Contract Language Itself

The State proposed the change in work schedules when the July 1, 1981 - June 30, 1982 collective bargaining agreement between the parties was in effect. The Agreement, in Article XVIII(2) contains the following language relative to work schedule changes:

> New shifts - In any department or institution, prior to establishment of a new shift (a shift with starting and quitting times different from any

> existing shift) or a new workweek (a combination of workdays constituting 40 hours which is different from any existing combination of workdays, or which includes evenings or half-days), the appointing authority shall notify the Association and shall negotiate the impact of that decision to the extent required by law.

We took evidence on the bargaining history of this contractual language to have a full record to decide this case. However, we are cautioned by our Supreme Court that a contract must be interpreted by the common meaning of its words where the language is clear. Vermont State Colleges Faculty Federation v. Vermont State Colleges, ___ Vt. ___ (April 16, 1982), and not to consider "extrinsic evidence" where the agreement is clear and unambiguous. In re Grievance of Ruth Muzzy, ___ Vt. ___ (July 15, 1982). We find it unnecessary to consider the extrinsic evidence of bargaining history here because the meaning of the phrase "negotiate to the extent required by law" is clear: the parties will negotiate to whatever extent they are legally required by SELRA as interpreted by the Board or the Supreme Court. Thus, by agreeing to this contractual language, the parties have simply left it to litigation to determine to what extent they are required to bargain.

The State argues, however, that the parties waived any right to invoke the statutory procedures by choosing the word "negotiate" rather than "bargain" in the contractual language, since the procedures are substitutes for negotiations but are not negotiations themselves.

In essence, the State claims it contracted only to "meet and confer" over the impact of the schedule changes, but that it was under no duty to do more.

In determining whether a party has waived its bargaining rights, we have required that it be demonstrated a party consciously and explicitly waived its rights. VSEA v. State of Vermont, 2 VLRB 26 (1979). IAFF v. City of Barre, 2 VLRB 81 (1979). VSEA v. State of Vermont, 2 VLRB 155 (1979). Mt. Abraham Education Association v. Mt. Abraham Board of School Directors, 4 VLRB 224 (1981). In such matters, we are further guided by our Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Selma Guttman and Walter Minaert, 139 Vt. 574 (1981).

Given this waiver test, we do not accept the State's distinction in meaning between the words "negotiate" and "bargain". In labor relations, the words are interchangeable, and to "negotiate" or "bargain" in good faith means to negotiate through the conclusion of all required statutory dispute resolution procedures. Burlington, supra. Rutland, supra. Chester, supra. Given the similarity of usage of the two words in labor relations, we fail to see how VSEA "intentionally relinquished" its right to invoke the statutory procedures.

Therefore, we conclude that the contract itself does not remove this case from the general rule.

3(b) Applicability of Statutory Dispute Resolution Procedures to Mid-Term Bargaining Disputes

The State, absent a waiver by either the terms of the Agreement or by actual negotiation, has a duty to bargain changes in mandatory bargaining subjects during the term of an agreement. VSEA v. State of Vermont, 2 VLRB 26 (1979). VSEA v. State of Vermont, 2 VLRB 155 (1979).

The State argues their bargaining obligation in mid-term bargaining situations terminates upon declaration of impasse by either party, that the statutory dispute resolution procedures are not applicable. We believe the Legislature intended the impasse resolution procedures to apply to bargaining disputes arising during the term of an agreement where a duty to bargain exists. 3 VSA §925(a) provides the impasse resolution procedures are applicable when an impasse is reached "during the course of collective bargaining" on mandatory subjects. Collective bargaining is not limited to the Master Agreement negotiated by the parties. 3 VSA §902(2) defines collective bargaining as "the process of negotiating terms, tenure or conditions of employment... with the intent to arrive at an agreement which, when reached, shall be reduced to writing". Parties, when negotiating mid-term mandatory bargaining subjects, are intending to arrive at a written agreement.

This interpretation of the statute is consistent with the stated policy of SELRA to:

> ...prescribe the legitimate rights of both state employees and the State of Vermont...in their relations with each other, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, ...to define and proscribe practices which are harmful to the general welfare, and to protect the rights of the public in connection with labor disputes.

To this end, the Legislature proscribed the strike as an economic weapon of State employees, 3 VSA §902(b), and, in its place, substituted impasse resolution procedures. The Legislature has opted for a peaceful and reasoned, although often-times lengthy, approach to resolve bargaining disputes rather than a potentially-disruptive approach emphasizing the respective powers of the parties. Without resort to the impasse resolution

procedures over mid-term bargaining disputes, State employees would be left without meaningful collective bargaining rights in regard to such disputes. Employees would have neither the strike weapon nor threat of a Board (or legislatively) imposed settlement to induce the State to bargain meaningfully. We believe to interpret SELRA as the State asks would be contrary to the intent of the Legislature.

3(c) "Impact Bargaining"

Although work schedule changes are a mandatory subject of bargaining, the parties have committed that decision to the discretion of management by negotiating the contract language on schedule changes, and required only that the parties bargain the "impact" of that decision. The State argues that by agreeing to this language, VSEA has waived its right to consider the subject as a mandatory subject of bargaining, and since the statutory dispute resolution procedures are applicable only for impasses on mandatory bargaining subjects, VSEA has waived its right of access to the procedures.

The State's argument assumes bargaining the "impact" of a decision expressly committed to management's discretion cannot be considered a mandatory subject of bargaining. This is a view rejected by the National Labor Relations Board (NLRB), Federal courts, and state labor relations boards, who have found the "impact" of a management decision a mandatory subject of bargaining if it affects employees' conditions of employment. Holiday Inn of Benton, 237 NLRB No. 157 (1978). General Motors Corp., 191 NLRB No. 149 (1971). Affirmed, US Ct. of Appeals, DC Circuit, 470 F2d 422 (1972). Hilton Central School District, New York Public Employment Relations Board, 14 PERB 3038, 14 PERB 4515 (1981). New

Bedford School Committee, Massachusetts Labor Relations Commission, 8 MLC 1472 (1981). City of Bridgeport, Connecticut State Board of Labor Relations, Decision No. 1485 (1977). The schedule an employee must work is a central working condition, and any decision to change the schedule will clearly impact on the working conditions of employees. 3 VSA §904(a)(3). Accordingly, bargaining the impact of the decision to change work schedules is a mandatory subject of bargaining, and subject to the statutory dispute resolution procedures.

In sum, we find that none of the variables distinguishing this case from the expired agreement case affect the conclusion reached under the usual rules: The parties must negotiate the impact of the decision to implement the "6-2 Schedule" through the completion of statutory dispute resolution procedures or until they reach agreement. Accordingly, we grant VSEA's Petition to Appoint a Fact-Finding Panel for the reasons given here and the reasons given in our earlier decision in this aspect of the case. Petition of VSEA for Appointment of Fact-Finding Panel, 5 VLRB 215 (1982). In the interim, the State can unilaterally implement the "6-2 Schedule" upon reaching of statutory "impasse" pursuant to 3 VSA §925(a) only by fulfilling the requirements of 3 VSA §982(f). Accordingly, the State has committed an unfair labor practice in violation of 3 VSA §961(5) by, in essence, "refusing to bargain collectively" because it has unilaterally implemented the "6-2 Schedule" without following the 982(f) requirements and is guilty of an unfair labor practice in violation of 3 VSA §961(5) by refusing to participate in the statutory dispute resolution steps.

4. Waiver of Factfinding

A final contention raised by the State is that since the Board is obliged to follow the statutory procedure and appoint a mediator and has not done so, there is no legal necessity to proceed to fact-finding. We disagree. The statutory procedure has been complied with. VSEA petitioned the Board to appoint a mediator in early March, 1982. The Board granted the petition. A mediator was subsequently appointed by the Federal Mediation and Conciliation Service at the request of the Board. In making that request, the Board did not decide whether the statutory dispute resolution procedures applied to mid-term bargaining, but with concurrence of the parties decided to make one more effort to reach agreement without deciding the legal issues involved. In any event, mediation has been used unsuccessfully and it would be pointless to appoint another mediator. Accordingly, we believe it is mandatory to appoint a fact-finding panel to assist the parties in resolving their negotiations disputes.

ORDER

Now, therefore, based on the foregoing Findings of Fact and for the foregoing reasons, it is hereby ORDERED:

1. Fifteen days having elapsed since a mediator was appointed, and the State of Vermont and the Vermont State Employees' Association, having reached statutory impasse pursuant to 3 VSA §925(a) in negotiations during the term of the collective bargaining agreement concerning the impact of proposed schedule changes for certain employees of the Vermont State Hospital, and the Vermont State Employees' Association having requested the appointment of a fact-finding panel, a fact-finding panel is hereby appointed pursuant to 3 VSA §925(b), and the parties are ordered to comply with 3 VSA §925(c).

2. The State shall cease and desist from unilaterally implementing the schedule change (the so-called "6-2 Schedule") at the Vermont State Hospital unless and until it has legally followed the provisions of 3 VSA §982(f).

3. The parties shall negotiate the impact of the decision to implement the "6-2 Schedule" through the completion of the dispute resolution procedures as provided in 3 VSA §925; or, alternatively, until they reach agreement.

Dated this 20th day of August, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson